

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
REPLY BRIEF**

ORIGINAL

74-1554

B P / S

To be argued by
ARTHUR KARGER

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

against

MICHAEL PATERNO, GEORGE DENTI and
PATERNO & SONS, INC.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF OF APPELLANTS MICHAEL
PATERNO AND PATERNO & SONS, INC.

ARTHUR KARGER,
Attorney for Defendants-Appellants,
Michael Paterno and
Paterno & Sons, Inc.,
600 Madison Avenue,
New York, N. Y. 10022.

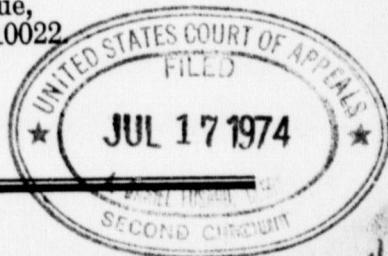


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As To The Evidence¹

The Government's brief is full of misstatements and distortions of the evidence, unsupported conclusory assertions and unwarranted innuendos.

¹ Unless otherwise specified, figures in parentheses followed by the letter "a" refer to the pages of Appellants' Joint Appendix, "G. Exh." refers to a Government Exhibit, and the letters "p." or "pp." following "G. Exh." refer to the pages of appellants' joint Exhibit Volume, and "D. Exh." refers to a Defendants' Exhibit.

The main brief of appellants Paterno and Paterno & Sons, Inc. (hereinafter referred to as "Paterno main brief") presents a fair and accurate statement of the evidence, including the testimony with respect to (a) the cashing of the checks in question at the Royal National Bank (Paterno main br., pp. 6-8), (b) the hiring of truckers for the various jobs (*id.*, p. 9), (c) the office procedures relating to the preparation and signing of checks in payment of invoices (*id.*, pp. 10-13), and (d) the statements relating to the subject matter of the case which O'Reilly and Mrs. Ferraro testified were made to them by Paterno (*id.*, p. 13), and the statement relating to such subject matter which Andretta testified was made to him either by Paterno or Denti (*id.*, pp. 7-8).

Without disputing the accuracy of the statements of fact set forth in the Paterno main brief, and without itself presenting a precise and accurate statement of facts, the Government (br., pp. 5-12) instead indulges in unsubstantiated broad conclusory assertions as to Paterno's "complete control of the company's business and particularly its bill-paying process" (*id.*, p. 9), as to his alleged irregularities in "treatment of the invoices from the five fictitious truckers" (*id.*, pp. 9-11), and as to his allegedly having falsely "insisted at various times and to various individuals that the five payees were legitimate truckers" (*id.*, pp. 7, 12).² It is indeed on the predicate of such

² The footnote at page 12 of the Government's brief misstates the facts since all that Andretta testified he stated on the occasion in question was that he "reminded George [Denti] that he called me and, what is the story on these fellows, and so on and so forth, and it was more or less like that"; and Andretta emphasized that he didn't "remember the exact wording of what was said" (406a). Certainly, the mere fact that Andretta might have stated that he had approved the cashing of the checks in question at Denti's request would afford no basis for charging Paterno with any guilty knowledge. It may be noted in this connection that O'Reilly testified that Denti had on many occasions arranged for the cashing of O'Reilly's payroll checks (1245a-1247a).

unsupportable conclusions and of its many misstatements of the evidence that the Government has attempted to construct its untenable case against defendants Paterno and Paterno & Sons, Inc.

Thus, the Government asserts that O'Reilly "testified under a grant of immunity that he had never heard of the five truckers" (br., pp. 5-6), and that "he had never entered the names of the fictitious payees on a cost sheet" (br., p. 10, fn.**). However, all that O'Reilly testified to was that *he had no recollection* as to whether any of the five truckers in question had ever worked on one of the Paterno company jobs, or whether he had ever called them for the purpose of having them do such work, or whether he had ever written any of their names on one of his daily reports (1225a-1228a).

Indeed, when he was asked with respect to one of the five, Catenzaro, whether he had ever called "a Michael Catenzaro to rent trucks", O'Reilly's answer was: "I might have, I don't know" (1226a). O'Reilly further testified that he "didn't have a list of truckers", and that "there's a thousand truckers" (1232a), and that he had no "recollection of the names of each one of the truckers who hauled material" from a particular Paterno company job (1300a).

Even the Government's conclusory assertions as to Paterno's being "in complete charge" of the corporate defendant's operations (br., pp. 6, 9) are likewise not supported by the record. As authority for such assertions, the Government (br., pp. 6, 9) cites the testimony of one of the bookkeepers, Mrs. Ferraro, who, however, testified only that Paterno "did estimating on jobs, he went out to jobs", he "was the boss", and that as far as his general schedule was concerned, "he might be out on a job or he may have an appointment" and that it would be dif-

ficult for her to estimate how he allocated his time (1080a-1082a).

In a footnote to its brief (p. 8), the Government makes the amazing statement that "Paterno apparently concedes * * * that the deductions taken on the tax returns were false * * *." The Government thereby completely ignores the defendants' defense that regardless of whether the five payees in question were or were not fictitious, the monies represented by the checks payable to such payees had actually been expended by the corporate defendant for the necessary work of hauling away excavated earth from the job sites involved (Paterno main br., pp. 32-38).

By way of innuendo, the Government (br., pp. 6, 11) attempts to convey the false impression that defendant Paterno wilfully violated a "subpoena and court order" by failing to produce "delivery receipts from any of the five fictitious payees", and it contends that an inference may therefore be drawn that such delivery receipts "never existed". However, there is nothing in the record—and the Government does not cite any portion of the record—to support either the foregoing innuendo or the contention predicated thereon.

The record shows that the prosecutor complained to the trial court only about his not having been furnished with invoices from the various trucking companies that did business with Paterno & Sons, Inc. during the years in question, and that such invoices were thereafter produced, together with certain other records which the prosecutor also requested (478a-481a, 576a-579a, 813a-819a). But there is nothing in the record to show that the prosecutor ever complained about the defendants' failure to produce any delivery receipts pursuant to any subpoena or court order, and there is certainly no evidentiary basis whatever for any contention that defendants Paterno or

Paterno & Sons, Inc. was guilty of any wilful violation of any subpoena or court order.

As a matter of fact, as shown in the Paterno main brief (p. 12), Mrs. Ferraro testified that in the interests of conserving space, her practice was to remove the back-up receipts from the files and dispose of them after some time had elapsed subsequent to the payment of the particular invoices, leaving only the invoices and the cancelled checks in the files (1105a, 1106a, 1120a). In addition, the company moved its offices several times (1052a, 1078a, 1126a), and Mrs. Altro testified that while the company was at its former City Island office, the cost sheets had been removed from the filing cabinets because of shortage of space and put in cardboard boxes, and that was apparently the last she had seen of those boxes (710a-711a).³

Another example of evidentiary distortion by the Government involves its capsulized and misleading version of the evidence relating to the matter of stapling (G. br., pp. 10-11; cf. Paterno main br., pp. 10-12, 25-27). The Government asserts (br., pp. 10-11) that "there was a staple mark in every one of the Paterno invoices from legitimate truckers *in evidence at the trial*" (emphasis supplied). But even if that assertion were assumed to be true (but cf. G. Exh.'s 105-107, pp. 139-142; Paterno main br., p. 27), the fact remains that only a minuscule number of

³ The Government's assertion (br., p. 6, fn.*) that Mrs. Altro "also testified that delivery receipts were not destroyed", is not supported by the record. At pages 711a-712a (cited by the Government), Mrs. Alto merely testified that she herself did not remove the delivery tickets from the invoices and throw them away or see anyone else do it, as Mrs. Ferraro testified her practice had been, and that she had never seen any of the invoices or delivery tickets destroyed. Mrs. Altro further testified that she didn't "remember what happened to them" (711a)

the invoices from "legitimate" truckers were introduced in evidence at the trial, and, obviously, no inference could be drawn from that small sampling as to the practice followed with respect to the voluminous bills and "thousands of checks" paid by the Paterno company during the period in question (757a-758a, 1097a).

The foregoing "Paterno invoices from legitimate truckers *in evidence at the trial*", on which the Government apparently relies (br., pp. 10-11; emphasis supplied), thus consisted only of (a) a group of 22 invoices, and 13 Paterno company checks in payment thereof, representing the charges of seven separate truckers which were paid between July 1968 and January 1969 and aggregated but \$8,171.90 (D. Exh.'s X-1 through X-11),⁴ and (b) two invoices from a certain B. & C. Trucking Company dated October and November 1965, respectively, and in the respective amounts of \$2,900.88 and \$4,229.88 (D. Exh.'s I, J). An analysis of the Paterno company's trucking expenses, which was prepared by the Government's own IRS Agent Rizzo, clearly shows that the foregoing charges constituted but a minor fraction of the Paterno company's total invoices from "legitimate" truckers (231a-236a; G. Exh. 173, p. 160).

The Government further persists in its claim (br., p. 11) that there were no staple marks "on over 80% of the invoices for the fictitious payees", notwithstanding the showing in the Paterno main brief (p. 26, fn.) that the

⁴ It may further be noted that the aforementioned group of 22 invoices and 13 checks (D. Exh.'s X-1 through X-11) did *not* antedate Mrs. Altro's employment, as asserted by the Government (br., p. 11, fn. **). On the contrary, the checks were all dated after May 1968, when Mrs. Altro became the bookkeeper (670a), and except for one invoice for \$94.13 dated February 7, 1968 (D. Exh. X-11), all the other invoices were likewise dated from and after May 1968.

80% figure was an inaccurate one since it included the period prior to Mrs. Altro's tenure. Contrary to the Government's assertion (br., p. 11, fn.**), it is not true that none of the invoices from the five payees in question which were processed during the period from and after May 1968 had no staple marks (*cf.* G. Exh.'s 23A, 24A, 38A, 40A, 45A, 46A).

The Government's brief (pp. 9, 10) also contains erroneous and misleading statements with respect to the amounts, and delays in payment, of the invoices in question as compared with invoices from so-called legitimate truckers. Thus, the record in no way supports the Government's assertion (br., p. 9) that "the average invoice from a legitimate trucker during the four years was less than \$400." Furthermore, the mere fact that the invoices from the five payees in question were in substantial amounts because they were submitted at the end of the month and included all trucking services rendered during the month, could obviously not serve as the basis for an inference, as claimed by the Government (br., p. 10), "that Paterno knew the checks he was signing were not for trucking services". Thus, the Government's own evidence showed that Cross County Trucking, Inc., a "legitimate" trucker, followed the very same practice by submitting invoices to the Paterno company in May and June 1966 for \$2,119.99 and \$2,549.25, respectively, for trucking services rendered during the preceding months (G. Exh.'s 105, 106, pp. 139-141).

Moreover, the analysis prepared by IRS Agent Rizzo shows that the totals paid by the Paterno company for equipment rental expenses to various trucking companies, other than the five payees in question, were higher than those paid to such five payees, for all but one of the years in question, and that the total amounts paid for equip-

ment rental expenses aggregated \$882,808 for the five fiscal years referred to in Count 1 of the indictment (231a-236a; G. Exh. 173, p. 160). Moreover, the total expenses reported in the company's tax returns during that five-year period amounted to over 11 million dollars (G. Exh.'s 50-54, pp. 99, 103, 107, 111, 115, 119, 123, 128, 131, 138).

The Government also exaggerates the extent of the delays in payment of the invoices in question (G. br., p. 10). It thus ignores the documentary evidence showing that out of 44 of such invoices in evidence (G. Exh.'s 1A-12A, 14A-28A, 30A-34A, 36A-47A, pp. 1-97), 3 invoices were paid within two to three weeks (G. Exh.'s 3A, 14A, 44A), 6 within one month (G. Exh.'s 6A, 10A, 17A, 18A, 25A, 36A), 8 within five to six weeks (G. Exh.'s 1A, 5A, 7A, 11A, 12A, 32A, 33A, 37A), 2 within seven weeks (G. Exh.'s 2A, 9A), and 11 within eight to ten weeks (G. Exh.'s 15A, 19A, 20A, 21A, 22A, 30A, 34A, 38A, 41A, 43A, 45A).

In addition, the Government ignores the evidence showing that there were also substantial delays in paying the invoices of unquestionably legitimate truckers (766a-773a), and that it was the company's practice, when its cash position was low, to withhold payment of charges incurred on a particular municipal or government agency job until the company received payment for the job (719a, 1122a-1123a). Furthermore, the fact—to which the Government itself points (br., p. 10, fn.*)—that there were many calls to the office from truckers requesting payment of past due invoices (1107a-1109a), likewise shows that even the bills of "legitimate" truckers were not always promptly paid. Moreover, it would be sheer speculation to attempt to infer guilty knowledge on Paterno's part merely from evidence that there were delays in the payment of particular invoices.

Beyond that, there is no evidentiary basis for any finding that Paterno had actual knowledge of the extent of the delay in payment of every particular invoice. The Government attempts to create the erroneous impression that Paterno himself reviewed and checked every invoice before any checks were drawn. The Government thus asserts (br., p. 9) that Paterno "reviewed and checked all bills" each month. However, the evidence showed only that during the period of Mrs. Ferraro's tenure, prior to May 1968, it was Mrs. Ferraro's practice to prepare an accounts payable list at the end of each month and to present it to Paterno, who would decide whom and how much to pay (1090a-1092a). The accounts payable list was very extensive, since there were "hundreds of bills" (1092a-1097a), and the expenses, as noted above, amounted to millions of dollars. There was nothing to show that Mrs. Ferraro submitted any additional material, such as the invoices, to Paterno with the list of accounts payable or that she provided him with information showing how long the particular accounts had been outstanding. There was no testimony by Mrs. Altro that she followed the practice of preparing and submitting to Paterno a monthly list of accounts payable during her tenure (see Paterno main br., p. 12 for a summary of Mrs. Altro's testimony in this regard).⁵

The Government (br., p. 10, fn.*; p. 11) further misstates the evidence by asserting—without any supporting

⁵ It may be noted that the few instances, which the Government stresses (br., pp. 10, 12), involving delay in payment of as much as about six months, in two cases (G. Exh.'s 24A, 47A), and about nine months in one case (G. Exh. 26A), and the two invoices entered on the company's books in May and November 1969, respectively, which were never paid (see Paterno main br., p. 30), represented items which accrued or were paid during Mrs. Altro's tenure.

record citations—that "None of the fictitious truckers called the offices" and that "While the office employees recalled certain truckers who did pick up their checks, they were certain that none of these five had ever done so."

None of the testimony of the three women employees, on which the Government apparently relies, in any way supports these assertions. Thus, Mrs. Ferraro testified that she received hundreds of calls, including calls from truckers requesting payment of past due invoices, but that she did not recall the names of all such truckers, and that she did not recall whether she had ever received any phone calls from any of the five payees in question (1107a-1109a, 1111a). Similar testimony was given by Mrs. Altro (715a-716a), and Miss Nunkin merely testified that she did not remember whether the names of any of the five payees in question were on the rolodex which she kept (1024a-1025a).

There is likewise no evidentiary support for the Government's assertion (br., p. 11) that it was Paterno's practice, after signing the checks, to "turn the checks over to his employees for mailing in the regular course." The Government cites the testimony of Mrs. Ferraro, but all that she testified to was that it was her practice, after the checks were signed, to mail them out unless she had received a call from a payee "to keep it there", so that the payee could "pick it up" (1110a-1111a). When she was asked whether she recalled having received any telephone calls from any of the five payees in question, she said that she "could not possibly remember" (1111a).

Furthermore, any evidence with regard to the office routines relating to whether checks were mailed to particular payees or picked up by them, was completely immaterial so far as Paterno was concerned, since there was no evidence whatever to show that Paterno had any knowledge of, or in any way concerned himself with, the practice or routines relating to such matters.

POINT I

As to the insufficiency of the evidence to establish the requisite elements of wilfulness, guilty knowledge and criminal intent on the part of defendants Michael Paterno and Paterno & Sons, Inc.

The Government in no way disputes the principles of law discussed in the Paterno main brief (pp. 16-32), and indeed fails to meet the analysis of the facts in the Paterno main brief, showing the absence of any evidentiary basis for imputing the requisite elements of wilfulness, guilty knowledge and criminal intent to defendants Michael Paterno and Paterno & Sons, Inc.

The Government has instead sought to distort the evidence in an attempt to sustain the convictions of Paterno and the Paterno company on the basis of nothing more than suspicion and innuendo rather than competent evidence.

It is submitted that on the record in this case, as shown in the Paterno main brief and in this reply brief, defendants Paterno and Paterno & Sons, Inc. are entitled to judgments of acquittal under the applicable legal principles.

POINT II

As to the erroneous action of the trial court in demeaning defendants' defense in the presence of the jury and in hampering the presentation of such defense.

Contrary to the Government's assertion (br. p. 13), there were several occasions on which the trial court forcefully expressed its view, *in the presence of the jury*, that "the issue in the case" was "whether these five truckers, or any of them, were existent or non-existent" (1315a-1316a, 1616a; see Paterno main br., pp. 34-5).

There is likewise no merit to the Government's purported excuse (br., p. 13) that "at that time . . . defense counsel had not articulated their theory." As a matter of fact, at the same time that the trial court enunciated the foregoing position, it made it clear to defense counsel that any evidence along the lines of defendants' announced defense which did not meet the issue as to the existence of the five payees in question would be excluded as irrelevant (1315a-1317a).

Significantly, the Government has nothing to say in its brief with respect to the remarks addressed to the witness James O'Reilly by the trial court and the prosecutor, which resulted in depriving defendants of O'Reilly's testimony as a defense witness (see Paterno main br., p. 36). When O'Reilly was called by the defendants as their witness, following their aborted attempt to adduce testimony on cross-examination of O'Reilly in support of their defense (see Paterno main br., pp. 35-6), the trial court immediately advised O'Reilly that the grant of immunity with which he had been clothed as a Government witness, would not extend to any testimony which he would be giving as a defense witness (1458a).

In addition, the prosecutor stated, in O'Reilly's presence, that "the questions that I hope to be asking him [O'Reilly] on cross-examination may result in a decision to him that he may have committed some sort of criminal act, and I want him to be aware of that * * *" (1462a). The trial court thereupon added the comment that, "Well, Mr. O'Reilly's history with us as a witness may invite that kind of approach * * *" (1462a).

The authorities condemn statements of this kind, by the trial court or the prosecutor, which have an intimidating effect on a defense witness by calling the attention of the witness to harmful consequences that might befall him if he testified for the defense. *Cf. Webb v. Texas*, 409 U.S. 95, where a Texas conviction was reversed on due process grounds because the defense's sole witness refused to testify after being warned by the trial court that he could be convicted for perjury if he lied under oath. *Cf.* also *United States v. Smith*, 478 F. 2d 976 (D.C. Cir.), where a conviction was reversed because a defense witness refused to testify after being warned by the prosecutor that he might incriminate himself and be subject to prosecution if he decided to testify for the defense.

It may further be noted that when Chief Justice Warren Burger sat on the Court of Appeals for the District of Columbia, he expressed the view that it might well be a violation of due process if the Government were permitted to compel the testimony of an unwilling key witness without also making the use of the immunity statute available to the defense to compel the testimony of another unwilling key witness whom the Government chose not to call. See *Earl v. United States*, 361 F. 2d 531, 534, fn.1 (D.C.Cir.). Justice Burger noted that in such a case it could be argued that "the Government could not use the immunity statute for its advantage unless Congress made the same mechanism available to the accused" (*id.*). It is

submitted that the same reasoning is here applicable and that since the trial court permitted the Government to compel the use of O'Reilly's testimony as a Government witness, defendants should likewise have been permitted to use the immunity statute in order to adduce defense testimony from O'Reilly.

The Government (br., p. 14) contends that the exclusion of O'Connell's testimony was justified because it "could only be based on estimates of many variable factors, none of which had been established by facts in evidence." However, the trial court itself had properly permitted O'Connell to testify to a number of such "factors", including the total amount of dirt to be hauled away, the capacity of the trucks used for excavation hauling during the period in question, the cost per day of renting a truck with a driver during that period, and the shortest route from the job site to the dump site on at least one of the jobs in question (see Paterno main brief, pp. 36-38).

Furthermore, in one of the excerpts from the trial court's remarks quoted by the Government (br., pp. 14, 15, fn.**), the trial court indicated that defendants should have adduced the testimony of "at least the job superintendent" with respect to the underlying facts. However, O'Reilly, one of the job superintendents, had given some preliminary testimony, on cross-examination, with respect to a number of such underlying facts (1311a-1312a), and he would have presented further testimony along these lines if he had been permitted to continue instead of being confronted by the prosecutor and the trial court, as noted above, with the prospect that he might run the risk of self-incrimination if he testified for the defense.

The Government (br., p. 16) urges that there should have been "direct testimony of actual work performed by the persons who did it or those who observed them doing

it." However, O'Connell was not permitted to give his estimate as to the amount of trucking required for the Carmel job (1574a-1576a), notwithstanding that he had personal knowledge of the conditions on that job, since he had served as an expert consultant thereon and had personally traversed the area (1573a-1574a).

In any event, as shown in the Paterno main brief (pp. 38-39), it was error for the trial court to refuse to receive the proffered competent expert opinion testimony of the witness O'Connell even though the opinions he expressed might merely be estimates which, however, were soundly based.

CONCLUSION

The judgments of conviction of the defendants-appellants Michael Paterno and Paterno & Sons, Inc. should be reversed, and judgments of acquittal should be directed in their favor, or, in the alternative, said defendants-appellants should be granted a new trial.

Respectfully submitted,

ARTHUR KARGER,
*Attorney for Defendants-Appellants
Michael Paterno and Paterno &
Sons, Inc.*

Services of three (3) copies of
the within

hereby admitted this
of

15th day

July , 1974

Attorney for

J. Lawrence Schleman
Recognized by
Gard Hermann, Sec'y.

